Legal Update Article

Hotly Debated EEOC Conciliation Regulations Scheduled to Become Effective

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The Equal Employment Opportunity Commission's (EEOC) amended regulations on required steps in the conciliation (settlement) phase of the EEOC administrative process for claims brought under Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the Age Discrimination in Employment Act are scheduled to become effective on February 16, 2021.

The stated goal of the new regulations is to conciliate more cases by providing respondents (and, in certain circumstances, charging parties) the factual and legal basis for the EEOC's reasonable cause finding. While this goal appears laudable, it is clear from some public comments that there is fierce opposition to the new regulations from some stakeholders and the regulations are not favored by a significant portion of the EEOC's workforce. Much of this controversy stems from perceptions of how the new regulations might affect a 2015 U.S. Supreme Court decision (*Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645) siding with the EEOC.

Background

The EEOC is required by relevant statutes to attempt to conciliate or settle a matter with a company after the agency has determined a reasonable cause exists to believe that discrimination or retaliation has occurred. If conciliation fails, then the EEOC can file a lawsuit.

During 1972-2015, some companies mounted "failure to conciliate" defenses in EEOC litigation, arguing an EEOC lawsuit should be dismissed because the agency did not properly conciliate. Defendants argued the EEOC made no effort at all to conciliate or it failed to provide sufficient information to the company in conciliation. Litigation over conciliation could be time-consuming and sometimes included discovery into the EEOC's investigation, as well as conciliation practices. On rare occasions, companies were successful in having a case dismissed due to the EEOC's failure to conciliate. Understandably, in litigation, the EEOC prefers to train its microscope on a company's employment practices and not have a microscope examining its own investigation or conciliation.

In 2015, in *Mach Mining,* the Supreme Court issued a ruling favorable for the EEOC. There were several key aspects:

- Favoring employers: the EEOC was required to provide information about its reasonable cause finding to a respondent company during conciliation.
- Favoring the EEOC: the EEOC needed to provide only basic information about the claim to a respondent company as part of conciliation.
- Favoring the EEOC: courts were not to hold the EEOC to a good faith standard during conciliation negotiations.
- Favoring the EEOC: Title VII confidentiality provisions forbid courts from considering

evidence of what was said and done during conciliation.
- Diminishing payoff from a failure to conciliate defense: even if a respondent company succeeded with a failure to conciliate defense, the only appropriate remedy is to order the EEOC to reengage in conciliation, *i.e.,* a lawsuit will be stayed and not dismissed.

Comments From EEOC Employee Union, EEOC Alumni

The National Council of EEOC Locals, the exclusive representative for bargaining unit employees at the EEOC, filed comments opposing the proposed conciliation standards. The union wrote that the regulations would open the door for tactics the Supreme Court rejected in *Mach Mining*: long and protracted litigation regarding not only the EEOC's conciliation efforts, but also the sufficiency of the EEOC's investigation efforts as a whole.

Mach Mining also was a prominent subject in comments filed by a group of 33 EEOC alumni, many formerly holding high-level management roles with the EEOC, and some having worked for the EEOC as recently as 2020. The EEOC alumni complained that the information the EEOC was obligating itself to provide in conciliation was burdensome and would put the EEOC at a litigation disadvantage. The EEOC alumni also claimed the proposed regulations would permit respondent companies to seek judicial review of whether the EEOC followed the proposed regulations and avoid Title VII's prohibition against disclosing conciliation communications. The EEOC alumni contemplated that EEOC trial attorneys would not be able to use case law in litigation if the EEOC did not use the case law in conciliation and that the regulations necessitated across-the-board waiver of all attorney-client privilege the EEOC would otherwise be able to assert in litigation.

EEOC's Response to EEOC Alumni, Plaintiff-Aligned Comments

In response to criticism from the EEOC's union and alumni, and in other parts of the Final Rule material, the EEOC indicated the new conciliation regulations would preserve the holdings of *Mach Mining* that favored the EEOC:

- The Final Rule requires the EEOC to provide only basic legal and factual information about the underlying claim and the regulations were aligned with *Mach Mining*'s requirement that the EEOC provide respondents with the person or categories of persons it has harmed. The EEOC stated that the new regulation does not require it to "lay all its cards on the table."
- The EEOC was not committing to a "good faith" standard in conciliation.
- The Final Rule permitted the EEOC to continue to assert all privileges it is entitled under the law, and that confidentiality provisions of Title VII remained intact as a barrier to a probing judicial review of conciliation.

In announcing the Final Rule, the EEOC did not address*Mach Mining*'s ruling that the remedy for a failure to conciliate was limited to a stay in litigation (the Final Rule itself does not address this issue specifically). The Final Rule materials state that the EEOC had determined the Final Rule will not unnecessarily open its conciliation process to judicial review or collateral attacks from employers.

The EEOC took into account some criticism from employee aligned groups. The[original proposed regulations](#) required the EEOC to disclose material information that caused it to doubt its determination of reasonable cause. The EEOC decided to remove this requirement from the Final Rule. The EEOC asserted the sufficiency of existing protocols

requiring field personnel not to enter a reasonable cause finding where the facts or law do not support the finding.

EEOC's Response to Suggested Changes from Employer Groups

The EEOC disclosed 13 changes suggested by commenters supporting the proposed regulation. A sampling of the proposed changes and the EEOC's response include:

- The proposed rule permitted the EEOC to not disclose in conciliation the identity of alleged aggrieved individuals if those individuals requested anonymity. Jackson Lewis and other commenters suggested this exception was too broad and individuals who were not current employees (former employees or applicants) should be identified in all instances. The EEOC declined to implement this requested change.
- There was some ambiguity as to whether the EEOC would be required to identify harassers, at-fault supervisors, and potential class size in conciliation. Jackson Lewis and employer-affiliated groups requested the language of the Final Rule make clear the EEOC would be required to make these disclosures. The EEOC has revised the language of the Final Rule to implement this suggested change.
- The proposed rule permitted charging parties and aggrieved individuals to obtain the same information provided to a respondent on request. Jackson Lewis and employer-affiliated groups suggested that disclosures should be limited to the individual who makes the request. In other words, in a case with numerous aggrieved individuals, the charging party would receive information about the charging party's claims, not other aggrieved individuals'. The EEOC revised the Final Rule such that any information provided to the respondent, except for information about another charging party or another aggrieved individual, will be provided to the charging party upon request.
- Jackson Lewis noted that in some conciliations, the EEOC seeks the respondent's agreement to permit the EEOC to issue a press release regarding conciliation. Jackson Lewis argued that this practice was inconsistent with the spirit of the provisions of Title VII restricting disclosure of things said and done during conciliation. The EEOC declined to make this requested change, stating that publication of conciliation results often furthers the EEOC's objectives.

Next Steps

The Final Rule applies to all conciliations involving reasonable cause findings issued February 16, 2021, and later. Since the rule was published in the *Federal Register* prior to January 20, 2021, it is not subject to the Biden administration's regulatory freeze and remains scheduled to become effective. Furthermore, any alteration or repeal of the rule would require a majority approval of the EEOC's Commissioners and would likely necessitate the EEOC engaging in the rulemaking process again.

Congress has options under the Congressional Review Act to vote to rescind the rule (and other recently implemented rules), but this would require a majority in both houses and the President's signature within the limited time described in the law.

Jackson Lewis attorneys will continue to monitor EEOC conciliation practices. The Final Rule was approved by a 3-2 vote, with the three Republican Commissioners approving the Final Rule and the two Democrats opposing it. Since the vote, President Joe Biden appointed Democratic Commissioner Charlotte Burrows Chair of the Commission. On January 27, 2021, the EEOC announced that it had terminated an EEOC conciliation pilot program that required stricter conciliation accountability from EEOC field offices to

headquarters. In light of the EEOC's change in leadership, it will be important to watch the implementation of the new conciliation rule.

If you have any questions about the EEOC, please contact your Jackson Lewis attorney.